

Neutrality at Crisis: A Legal Appraisal in Light of Contemporary International Law

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Abstract

The rules of neutrality formally entered the corpus of international law in 1907 through the promulgation of Hague Convention V on respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and the rules of neutrality in the present world still heavily rely on the rules that were propounded before the World War I. Since a new legal order emerged with the creation of the League of Nations and its successor, the United Nations, the rules of neutrality appear to be obsolete in the face of modern-day armed conflicts. Amid the reincarnation of a world forum following World War II i.e. the UN, other international, regional organizations, and varying breadth of sovereign prerogative exercised by the States under international law giving rise to complex international legal order, it is time to examine the relevant historical events as well as the key legal jurisprudence in question to determine how much of the law of neutrality has survived the test of time and the implications of it in the ever-changing landscape of international legal framework.

Keywords: Neutrality, Armed Conflict, Hague Convention V, World War I, World War II, United Nations, International Law

I. Introduction

Neutrality as a concept cannot be understood in isolation as it is a concept inseparable from conflicts.¹ Conflicts and international law have had an intertwined relationship since the very beginning. It will not be an overstatement if one argues that the development of international law primarily became necessary for the cessation of hostilities between two territories. Looking back at history, one will find that one of the earliest international law instruments was negotiated by Rameses II of Egypt and the king of the Hittites after the battle of Kadesh to terminate a state of aggression.² The nexus between conflicts and international law becomes clearer by looking at the creation of the League of Nations which was created ‘to promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war’,³ and the emergence of the United Nations after the Second World War cements the idea of outlawing armed conflicts.⁴ Nevertheless, even with the UN in place for the maintenance of global peace and security, armed conflicts did not become a thing of the past rather they continued often making the UN’s function seem obsolete. So remained

¹ The term ‘Conflict’ has to be understood to mean ‘state of war’ in traditional international law and ‘armed conflict’ in the contemporary IHL regime. For a detailed discussion on the distinction between state of war and armed conflict, see Christopher Greenwood, ‘Scope of Application of Humanitarian Law’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2013), paras. 201- 215.

² Malcolm N. Shaw, *International Law* (8th edn, CUP 2020) 11.

³ Covenant of the League of Nations (adopted 28 April 1919, entry into force 10 January 1920) 108 LNTS 188, preamble. (“LN Covenant”)

⁴ The prohibition against use of force was codified in article 2(4) of the UN Charter which has outlawed use of force and threats of use of force making it unlawful to wage war.

the laws of armed conflict to regulate the conduct of hostilities and the belligerent and as a corollary, the laws of neutrality to demarcate the duties and rights of neutral states during the existence of an armed conflict.

Much of the law of neutrality emerged before the beginning of World War I. In the time preceding WWI, neutrality could be exercised since a clear distinction could be drawn between the state of war and the state of peace. Laws concerning neutrality were developed at a time when the issuance of a declaration of war was customary before engaging in hostilities.⁵ Although not mandated by international law, it was generally the common practice of states to issue ‘declarations of neutrality’ when there was an outbreak of neutrality.⁶ Such practices allowed a clear demarcation between the positions of states during an armed conflict. The same cannot be said in today’s context. There is hardly any situation where a state formally declares war against another state nor are there declarations of neutrality issued by states. Moreover, before WWI states were, in principle, free to not engage in belligerency. The attitudes of states changed radically after the WWI. In the words of Taubenfeld, ‘... [T]here was a sharp upswing in the internationalist feeling’,⁷ which led to the creation of the League of Nations.⁸ Under the LN Covenant, if any member state resorted to war in defiance of articles 12, 13, or 15, it was considered a war against all the other member states, and the Covenant mandated immediate cessation of all kinds of trade and financial relations with the state that was waging war.⁹ It was pronounced several times that:

The idea of neutrality of Members of the League is not compatible with the other principles that all the Members of the League will have to act in common to cause their covenants to be respected.¹⁰

Even with the UN succeeding its predecessor after WWII, the difficulty remained. The UN Charter provides for the collective use of force on behalf of the victim of the aggression against the aggressor state should an armed attack occur.¹¹ Moreover, the Security Council can also oblige member states to exert military force for the maintenance of peace.¹² These provisions attack both principles of non-participation and impartiality which form the bedrock of the law of neutrality. The scholarship on the laws of neutrality does not suggest that the entire body of the law of neutrality has become futile.¹³ Rather, it has undergone significant changes specifically due to the promulgation of the UN Charter. Against this backdrop, the central question that needs answering is to what extent the law of neutrality with its archaic origins is still in force under contemporary international law and what are its implications on the armed conflicts of this day and age. This paper takes up the ambitious challenge of answering this question by thorough doctrinal perusal of the existing scholarship on this subject. It is pertinent to note that the present doctrinal investigation will be limited to issues of law of neutrality under the laws of armed conflict and the legal effects of permanent neutrality. A clear

⁵ Convention (III) Relative to the Opening of Hostilities (adopted 18 October 1907, entry into force 26 January 1910) 205 CTS 263, art 1. (“HC-III”)

⁶ Michael Bothe, ‘The Law of Neutrality’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2013) 575.

⁷ Howard J. Taubenfeld, ‘International Actions and Neutrality’ (1953) 47 AJIL 377, 378.

⁸ At the Paris Peace Conference of 1919, the Treaty of Versailles was negotiated which included the Covenant establishing the League of Nations. see George Scott, *The Rise and Fall of the League of Nations* (Macmillan 1974).

⁹ LN Covenant (n 3) art 16(1).

¹⁰ J F Lalive, ‘INTERNATIONAL ORGANISATION AND NEUTRALITY’ (1947) 24 BYBIL 73.

¹¹ Charter of the United Nations (adopted 26 June 1945, entry into force 24 October 1945) 1 UNTS XVI, art 51. (“UN Charter”)

¹² *ibid* art 42.

¹³ Bothe (n 6) 577.

demarcation between these two concepts will drawn in the subsequent sections. At the outset, the paper will examine the development of the laws of neutrality throughout history as well as the legal framework that draws up permanent neutrality to evaluate the conceptual underpinning and to locate its current position under international law. Then, the paper will divert its attention to determining the intricate relationship between the UN Charter and the laws of neutrality and also test the significance of rules of neutrality in the face of modern international armed conflicts before drawing a conclusion regarding the efficacy of rules of neutrality.

II. Neutrality Throughout History.

Under international law, neutrality refers to the status of a state that decides not engage in hostilities during the existence of an armed conflict.¹⁴ Non-participation in an armed conflict is the true essence of the law of neutrality.¹⁵ Besides, a state may during peacetime undertake a legal obligation to remain neutral during the existence of an armed conflict between two other states, a concept known as permanent neutrality.¹⁶ The laws relating to neutrality started emerging in a political landscape where global power politics was dominated by the conceptions of war during the fifteenth century.¹⁷ Later on, the codification efforts started in the late nineteenth century and the early twentieth century.¹⁸

The oldest notable contribution in this regard was the Paris Declaration of 1856,¹⁹ signed at the end of the Crimean War²⁰ to declare that the parties to this declaration shall not seize neutral goods on an enemy vessel or nor enemy's good on a neutral vessel, with the exception of contraband of war.²¹ Another important feat, perhaps the most important, in the codification of the law of neutrality, is the Second Hague Peace Conference of 1907 and the London Naval Conference of 1909. The Hague Conventions of 1907, particularly Hague Convention V²² and Hague Convention XIII²³ set up a robust treaty law regime concerning neutrality.²⁴ A couple of years later, the Declaration of London²⁵ (London Declaration) was negotiated in the London Naval Conference of 1909 to facilitate peaceful commerce and foster diplomatic relations between belligerents and neutral governments.²⁶ The declaration itself mandated ratification of the instrument by the signatories.²⁷ Unfortunately, it was not ratified by any of the signatories due to rejection by the House of Lords of the British Government.²⁸ The legal effect of this declaration might be very little but the conclusion of such instruments underpin the inclination of states towards having the law of neutrality.

¹⁴ *ibid*, 571

¹⁵ Quincy Wright, 'The Present Status of Neutrality' (1940) 34(3) AJIL 391, 392.

¹⁶ Switzerland and Austria are the only two states that possess permanent neutrality. see Bothe (n 6) 576-577.

¹⁷ Wright (n 15) 394.

¹⁸ Bothe (n 6) 574.

¹⁹ The Declaration Respecting Maritime Law (signed on 16 April 1856) 115 CTS 1. ("Paris Declaration")

²⁰ Charles H. Stockton, 'THE DECLARATION OF PARIS' (1920) 14 AJIL 356, 356.

²¹ Paris Declaration (n 19), arts 2 & 3.

²² Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entry into force 26 January 1910) 205 CTS 29. ("HC-V")

²³ Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entry into force 26 January 1910) 205 CTS 395. (HC-XIII)

²⁴ Bothe (n 6) 574; Malbone Watson Graham Jr., 'The Effect of the League of Nations Covenant on the Theory and Practice of Neutrality' (1927) 15(5) California Law Review 357.

²⁵ Declaration concerning the Laws of Naval War (signed on 26.02.1909) 208 CTS 338 ("London Declaration")

²⁶ *ibid*, preamble.

²⁷ *ibid*, art 67.

²⁸ Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (4th edn, Martinus Nijhoff Publishers 2004) 1111.

In the period between the late nineteenth century and the early twentieth century, states were making concentrated efforts to codify neutrality, and the Hague Conventions and the London Declaration are a testament to that. The basic tenets of neutrality such as the neutral states' territory shall be inviolable,²⁹ existed under international law as imprecise customs and principles of law but the Hague Conventions codified it. After the Hague Conventions, there has been no comprehensive codification of the law of neutrality much of which has no legal bearing today.³⁰ The 1949 Geneva Conventions and the Additional Protocol I to the Geneva Conventions have retained the law of neutrality. However, it did not add any novelty to the laws of neutrality. The Conventions merely allowed the neutral states to apply the GCs such as in the case of wounded and sick persons received or interned in the neutral territory.³¹ There were also certain private efforts to rejuvenate neutrality, for instance, the San Remo Manual on International Law Applicable at the Time of International Armed Conflict, 1994, and The Helenski Principles on the Law of Maritime Neutrality, prepared by the ILA.³² The formulation of this set of rules has, at least to some degree, strengthening the law of neutrality, with regard to naval warfare. Nonetheless, the efforts to draw up a robust set of rules that would protect the physical territory of a neutral state have remained unsatisfactory. Hence, the dearth of a robust neutrality law remains.

III. Neutrality in the Era of International Organization

After WWI broke out, the international community went into an interventionist role where states considered any armed conflict to affect the interests of the international community. During the armistice with Germany on 11 November 1918, a great majority of states comprised of both belligerent as well as neutral powers were passionately inclined toward the idea of creating a League of Nations to make wars impossible for the future.³³ Finally, the League of Nations emerged as the guardian of the international community against armed conflict with the conclusion of the Treaty of Versailles and the concept of neutrality came under attack. In the second session of the League of Nations, the Council explicitly stated that the neutrality of the member states was incompatible with how the League has been fashioned.³⁴ Later in 1928, by adopting the Pact of Paris, the international community 'condemned recourse to war for the solution of international controversies.'³⁵ On the face, it appeared that the adoption of the Pact of Paris seized the legal effect of *jus ad bellum* in theory.

In both practice and theory, some parts of the laws of neutrality remained operative even in the League of Nations era. There are primarily two reasons for this. Firstly, many states were not parties to the League of Nations Covenant and thereby, the provisions of the Covenant did not create a legal obligation on the part of those third states.³⁶ After its adoption, the League could

²⁹ HC-V (n 22) art 1.

³⁰ Bothe (n 6) 574.

³¹ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entry into force 21 October 1950) art 4.

³² Bothe (n 6) 574.

³³ F. P. Walters, *A HISTORY OF THE LEAGUE OF NATIONS* (OUP 1952) 5.

³⁴ Wright (n 15), 391; Although the Resolution adopted at the second session of the council did make an exception for Switzerland to recognize its Permanent Neutrality established by the Congress of Vienna. see Edgar Boujour, *Swiss Neutrality: Its History and Meaning* (first published 1946, Routledge 2018) 67.

³⁵ General Treaty for the Renunciation of War as Instrument of National Policy (adopted 27 August 1928, entry into force 24 July 1929) 94 LNTS 57 art 1.

³⁶ International Blockade Committee, 'Reports and Resolutions on the Subject of Article 16 of the Covenant' (1927) League of Nations Doc. A/14/1927/V; Later in 1969, VCLT codified this rule that an international treaty does not create an obligation on a third state unless such

attract only 55 states to become members. Even the United States, which was one of the vocal proponents for the establishment of the League, was not a member of the League.³⁷ Non-members of the League would typically exert full neutral powers. For example, when invited to assist the League in establishing collective security, Brazil and Saudi Arabia, a non-member state did not entertain this request.³⁸

Another particularly troublesome precedent was the League's acquiescence to Switzerland's permanent neutrality.³⁹ During the Vilna dispute in 1920, the Swiss Federal Council objected to the admission of League of Nations troops to reach Vilna citing reasons that it would violate their neutrality.⁴⁰ The Swiss even denied the right of passage to Lithuanian troops asserting their rights and duties as a neutral state.⁴¹ Again during the Italo-Ethiopian war, Switzerland maintained its position of non-participation by denying an arms embargo to Ethiopia on the grounds that it would contravene Switzerland's obligation under article 9 of the Hague Convention V.⁴² These issues soon revealed the practical problems and ineffectiveness of the collective security doctrine. There was no international cooperation in the enforcement of collective measures under the leadership of the League which underpins its ultimate failure.⁴³ As can be observed from the discussions in this chapter during the existence of the League of Nations, several states which comprised both member and non-member states of the League have reserved their right to remain neutral during the outbreak of hostilities, which made a clear indication that law of neutrality remained operational even after the innovation of the collective security doctrine. However, the same cannot be said about neutrality by looking at the post-WWII conflicts.

The end of WWII marked the beginning of the United Nations era. The UN assumed the same role as its predecessor, the League of Nations.⁴⁴ The UN Charter which is often termed the 'World Constitution' retained many of the provisions of the LN Covenant.⁴⁵ The most notable change in the attitude of the international community for the maintenance of peace was the outlawing use of force. The Charter expressly prohibited the use of force and even threat to use of force,⁴⁶ with the only permissible exception being self-defense or collective self-defense on behalf of the victim of aggression.⁴⁷ Nevertheless, the aggression persisted and it became rather complex in the post-WWII era.

As discussed in the second chapter, the last comprehensive codification of the law of neutrality was done in the Hague Conventions of 1909. The problem with this was that the Hague Conventions started to lose its relevance due to the massive change in the global political landscape. The Prime Minister of Japan in 2002 said concerning HC-V and HC-XIII:

state consent to it. see Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331 art 34.

³⁷ The other non-member states include Afghanistan, Ecuador, Brazil, Russia, Mexico, Egypt, Turkey. see Clarence A. Berdahl, 'The United States and the League of Nations' 27(6) Michigan Law Review 606, 606.

³⁸ Taubenfeld (n 7) 383.

³⁹ see (n 34).

⁴⁰ Patrick O. Cohrs, *The Unfinished Peace after World War I: America, Britain and the Stabilization of Europe, 1919–1932* (CUP 2006).

⁴¹ Bonjour (n 34) 115.

⁴² Taubenfeld (n 7), 383.

⁴³ *ibid*.

⁴⁴ The creation of the UN did not *ipso facto* marked the demise of the League of Nations. In a legal sense for almost six months the League of Nations and the UN co-existed. However, the beginning of WWII is considered as de facto demise of the league. see Daniel-Erasmus Khan, 'Drafting History' in Bruno Simma and Others (eds.), *The Charter of the United Nations: A Commentary*, Vol I (3rd edn, OUP 2012) 19.

⁴⁵ *ibid* 25.

⁴⁶ UN Charter (n 11) art 2(4).

⁴⁷ *ibid* art 51.

...[T]hese Conventions were adopted when war was not generally considered to be illegal under international law ... The provisions relating to neutral States in these Conventions cannot be applied currently as they were in the past.⁴⁸

This observation was indeed true. The Hague Conventions did not foresee the political complications of the post-WWII. During and after the Second World War, there was a rise in the number of states fashioning themselves as ‘non-belligerents’ to shrug off duties flowing from the law of neutrality.⁴⁹ For example, during the 2003 US-British intervention in Iraq, Italy had declared a proclamation of non-belligerency but its forces joined Iraq in operation ‘Ancient Babylon’.⁵⁰ India’s example can also be drawn in this regard. India has been one of the pioneers of the Non-Aligned Movement and has always maintained its position as a Non-Aligned power.⁵¹ However, in the wake of the Ukraine-Russia conflict, when Russia was being bulldozed by sanctions from the international community, India’s import of crude oil from Russia increased by nearly 13 fold from the previous fiscal year,⁵² calling into question the adherence to the principle of impartiality by India. Having economic ties with belligerents in itself does not contravene the law of neutrality,⁵³ as long as the support given to the adversaries is equal.⁵⁴ That is clearly not the case in the situation in question.

In the theoretical framework of modern international law, there is a scope for the law of neutrality to co-exist with the UN Charter. The collective self-defense provision under the UN Charter does not make it impossible for states to remain neutral. The wording of Article 51 does not make it obligatory for all the member states to participate in the collective self-defense effort.⁵⁵ Even in the post UN Charter development of international law, neutrality has been recognized. The 1949 Geneva Conventions and the Additional Protocol I contains certain provisions which entails right and duties of the neutral states as well as the duties of belligerent states in relation to the neutral state. For example, in absence of a prior agreement to the contrary, a medical aircraft of a belligerent state shall not fly over the territory of a neutral state.⁵⁶ If the collective security provision did not allow the possibility of any derogation, such development of international law recognizing the rights and duties of the neutrals would not be possible. The validity of law of neutrality has also been recognized by the International Court of Justice multiple times.⁵⁷ Hence, it is seemingly beyond doubt that neutrality exists. What are the implications of it is the real question that needs answering.

Even though multilateral treaties and rulings of ICJ has affirmed that principles of neutrality is applicable in the modern day international armed conflicts,⁵⁸ the Court did not elaborate on the contents of the laws of neutrality. If one has to fixate the contents of neutrality, one may look

⁴⁸ quoted by James Upcher in his book. see James Upcher, *Neutrality Under Contemporary International Law* (OUP 2020) 37.

⁴⁹ Bothe (n 6).

⁵⁰ Natalino Ronzitti, ‘Italy’s Non-Belligerency During the Iraq War’ in Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill 2005) 201.

⁵¹ Hennie Strydom, ‘The Non-Aligned Movement and the Reform of International Relations’ 11 MPUNYB 1, 1.

⁵² Biswajit Dhar, ‘Cheap Russian Oil Fuels India’s Response to Ukraine War’ (*The Diplomat*, 23 February 2024) <<https://thediplomat.com/2024/02/cheap-russian-oil-fuels-indias-response-to-ukraine-war/>> accessed 29 May 2024.

⁵³ Wilhelm Wengler, ‘The Meaning of Neutrality in Peacetime’ 10 McGill Law Journal 369, 369.

⁵⁴ HC-V (n 22) art 9.

⁵⁵ Bruno Simma and Others (eds), *The Charter of the United Nations: A Commentary*, Vol I (3rd edn, OUP 2012) 1339.

⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entry into force 07 December 1978) 1125 UNTS 3 art 31(1).

⁵⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (“*Nuclear Weapons*”); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

⁵⁸ *Nuclear Weapons* (n 57), para 89.

at the state practice which can be found from the military manuals of the states,⁵⁹ and matters of foreign policy.⁶⁰ This further creates a complication in accessing whether a country is neutral or not. One of the recent examples can be observed from the ongoing Israel-Palestine conflict. From the official position of the US, it has always claimed itself as a neutral state on paper.⁶¹ However, practice shows a different picture. In the face of the current all-out offensive launched by the Israel Defense Forces, the US house of representatives have passed a bill providing a 14.5 billion dollars in military aid to Israel.⁶² Not to mention the numerous vetoes to UNSC resolutions calling for ceasefire,⁶³ effectively making US neutrality non-existent.

IV. Conclusion

The efficacy of law of neutrality has always been in a precarious condition and stirred up much debate throughout the history. This paper has made an audacious attempt to critically access some of the debates that has emerged from time to time in order to understand the effect of law of neutrality in the context of modern day armed conflict. By looking at the historical events related to the creation of law of neutrality, it is safe to say that the law of neutrality emerged as a body of law to localize war and curb the effects of the armed conflict on the state non-participating states and international commerce.⁶⁴ Nevertheless, it appears that it has terribly failed to keep its intended promise. To denote the futility of the law of neutrality, Jessup wrote:

The law of neutrality was scarcely as firmly established then as it was in the 19th century, but a survey of diplomatic correspondence and prize court proceedings in the 16th and 17th centuries can not fail to convince the reader that the law even at that time was a thing to be reckoned with.⁶⁵

With the massive transformation that the international political landscape has gone through, this statement is more fitting today than it was back in 1932. In theory, it is undeniably true that some parts of the law of neutrality is still operational under the contemporary international law. Nonetheless, the implications of law of neutrality is practically nonexistent. The main reason behind this is the absence of reprisal for violation of law of neutrality. Thereby, a robust sanction regime is to be established. Establishment of an International Prize Court which was envisaged by the Hague Convention XII can go a long way in creating an enforcement mechanism for violations of neutrality. However, the rules regarding the establishment of International Prize Court as well as other rules relating to the law of neutrality needs thorough reexamination followed by a recodification in light of the present reality of the international legal order. Only than the 'crisis' in which neutrality has always found itself can be relinquished.

⁵⁹ Bothe (n 6).

⁶⁰ Although neutrality is implemented through the laws of neutrality, the decision to remain neutral is a political decision of the state. see JOHN N. PETRIE, *AMERICAN NEUTRALITY IN THE 20TH CENTURY: The Impossible Dream* (INSS 1995) 8.

⁶¹ *ibid* 39.

⁶² Staff Correspondent, 'US House passes \$14.5bn military aid package for Israel' *Aljazeera* (Online 3 November 2023) <<https://www.aljazeera.com/news/2023/11/3/us-house-passes-14-5bn-military-aid-package-for-israel>> accessed 30 May 2024.

⁶³ Nada Tawfik and James FitzGerald, 'US vetoes call for immediate Gaza ceasefire at UN' *BBC* (New York, 21 February 2024) <<https://www.bbc.com/news/world-us-canada-68346027>> accessed 30 May 2024.

⁶⁴ John H. McNeill, 'Neutral Rights and Maritime Sanctions: the Effects of Two Gulf Wars', 31 *VJIL* 631, 631.

⁶⁵ Philip C. Jessup, 'THE BIRTH, DEATH AND REINCARNATION OF NEUTRALITY' (1932) 26(4) *AJIL* 789, 790.

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